89-234

NO.

FILED
AUG 9 1989
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CLERK

In the Supreme Court of the United States

OCTOBER TERM 1989

JAKE CRATER, SR.
Petitioner

VERSUS

MESA PETROLEUM COMPANY, et al
Respondent

ON WRIT OF CERTIORARI OR REVIEW TO THE
THIRD CIRCUIT COURT OF APPEALS
FOR THE STATE OF LOUISIANA

ORIGINAL PETITION FOR WRIT OF CERTIORARI OR REVIEW

RALEIGH NEWMAN
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LAKE CHARLES, LA. 70601
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ATTORNEY FOR PETITIONER,
JAKE CRATER, SR.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED

Whether the Louisiana State Court's erred in holding that Louisiana State Workmen's Compensation laws were not preempted by federal law with respect to an injury to an oilfield worker on a fixed platform on the Outer Continental Shelf, offshore Louisiana, when the state law was in conflict with and inconsistent with the applicable federal law.

Does the supremacy clause of the United States Constitution mandate that state law inconsistent with federal law over an injured oilfield worker on the Outer Continental Shelf be subservient to the federal law?

LISTING OF ALL PARTIES

Undersigned counsel for petitioner, JAKE CRATER, SR., provides the following list of parties required by Supreme Court Rule 21.1(b).

1. MESA OFFSHORE INC., Defendant

2. MESA PETROLEUM COMPANY - Defendant/Third Party Defendant/Third Party Plaintiff

3. NICKLOS DRILLING CO. - Defendant/Third Party Plaintiff

4. ONEMUS FRUGE - Defendant

5. JAMES BOBBY NEILL - Defendant

6. COMPASS INSURANCE COMPANY - Defendant

7. NATIONAL UNION FIRE INSURANCE COMPANY - Defendant/ Intervenor

8. B. J. HUGHES, INC. - Third Party Defendant

/s/ Raleigh Newman
RALEIGH NEWMAN
COUNSEL FOR PLAINTIFF

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IN THE SUPREME COURT OF THE UNITED STATES
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OR REVIEW

****

STATEMENT OF JURISDICTION

This Petition for Certiorari arises out of a judgment by the Third Circuit Court of Appeals for the State of Louisiana, holding that the provisions of the Louisiana State Workmen's Compensation Act which granted tort immunity to Mesa Offshore Co. were applicable to an injury to an offshore worker on a fixed platform on the Outer Continental Shelf even when the state law grant of immunity to the general contractor, Mesa Offshore Company, was inconsistent with and in direct conflict with the provisions of the Outer Continental Shelf Lands Act. This decision was rendered February 8, 1989 with rehearing denied on March 8, 1989. *Crater v. Mesa Offshore Company, et al.*, 539 So.2d 88 (La. App. 3 Cir. 1989).

The Louisiana State Supreme Court denied Petitioner's Application for Writs of Certiorari on May 12, 1989.

The decision by the Louisiana State Court is in direct conflict with the case of *Gates v. Shell Oil*, 812 F.2d 1509 (5 Cir. 1987), which states that as a matter of law the "statutory employer" defense created by Louisiana Compensation law is inconsistent with the provisions of the Longshoremen's and Harbor Workers Compensation Act, which is applicable to offshore workers under the Outer Continental Shelf Lands Act.

The Supreme Court of the United States may properly exercise its power of supervision when the Louisiana State Courts rulings applying state law are in direct conflict with U. S. Court of Appeal's decisions which hold that as a matter of law, federal law is applicable.

Under the supremacy clause of the Constitution of the United States Article 6, cl. 2, state law, in conflict therewith, must yield to federal law.

Rule 17.1(b) of the Supreme Court Rules and 28 U.S.C.S. Section 1257(a) confer on this Honorable Court jurisdiction to review the judgment in question by Writ of Certiorari or Review.

STATUTORY PROVISIONS INVOLVED

Constitution of the United States Art. 6 cl.2

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be

the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

43 U.S.C.S. Sec. 1333(a) (2) (A)

"(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction. (1) The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State; Provided, however, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this Act.

(2)(A) To the extent that they are applicable and not inconsistent with this Act or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer

> Continental Shelf and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf."

43 U.S.C.S. Sec. 1333(b)

> "Longshoremen's and Harbor Workers' Compensation Act applicable; definitions. With respect to disability or death of an employee resulting from any injury occurring as the result of operations, conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.S. SS 901 et seq.) For the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.S. SS 901 et seq.) under this section."

33 U.S.C.S. Sec. 901

> "Effective dates and application of amendments made by Act Sept. 28, 1984. Act Sept. 28, 1984 P.L. 98-426, S 28(a)-(g) 98 Stat. 1655 provides:

"Except as otherwise provided in this section (this note), the amendments made by this Act (amending this section, among other things; for full classification consult USCA Tables volumes) shall be effective on the date of enactment of this Act (enacted Sept. 28, 1984) and shall apply both with respect to claims filed after such date and to claims pending on such date."

33 U.S.C.S. Sec. 904

Liability for compensation.

"(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under Section 7, 8, and 9 (33 USCA S907, 908, 909). In the case of an employer who is a subcontractor only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor."

33 U.S.C.S. Sec. 905

Exclusiveness of liability.

"(a) The liability of an employer prescribed in section 4 (33 USCS S904) shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an

employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by Section 4 (33USCS S904)"

LSA. R.S. 23:1032

Exclusiveness of rights and remedies; employer's liability to prosecution under other laws "The rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, or relations, against his employer, or any principal or any officer, director, stockholder, partner or employee of such employer or principal, for said injury, or compensable sickness or disease. For purposes of this Section, the word "principal" shall be defined as any person who undertakes to execute any work which is a part of his trade, business or occupation in which he was engaged at the time of the injury, or which he had contracted to perform and

contracts with any person for the execution thereof."

LSA. R.S. 23:1061

Principal contractors; liability

"Where any person (in this section referred to as principal) undertakes to execute any work, which is a part of his trade, business, or occupation or which he had contracted to perform, and contracts with any person (in this section referred to as contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the work or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him; and where compensation is claimed from, or proceedings are taken against, the principal, then, in the application of this Chapter reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the employee under the employer by whom he is immediately employed."

STATEMENT OF THE CASE

Petitioner, JAKE CRATER, SR., a Louisiana resident, was employed by B. J. Hughes, Inc. to do sand control work out of their Lake Charles, Louisiana, office. Sand control work is a specialized service performed in connection with the drilling and production of oil.

On May 13, 1983, Petitioner was injured on a fixed

platform, which was located seventy-five miles in the Gulf of Mexico on the Outer Continental Shelf, while in the course and scope of his employment with B. J. Hughes, Inc. Petitioner has undergone seven major surgeries as a result of his injuries and has been receiving benefits under the Longshoremen's Harbor Workers Compensation Act.

Petitioner filed suit against Mesa Offshore Co., among others, alleging negligence in causing his injuries. Mesa Offshore Co. and Santa Fe were joint lease holders and had entered into an offshore joint venture, whereby Mesa would be the operating party. Mesa, in turn, hired B. J. Hughes, Inc., Petitioner's employer, to do certain sand control work. B. J. Hughes, Inc. had furnished coverage to Petitioner, its employee, under the Longshoremen's and Harbor Workers Act. Mesa filed a Motion for Summary Judgment in the trial court, alleging that it was the statutory employer of Petitioner and was immune from tort suit under the provisions of the Louisiana Workman's Compensation Act Sections 23:1032, 1061. The trial court granted the Motion for Summary Judgment.

Petitioner took an appeal to the Third Circuit Court of Appeals for the State of Louisiana arguing to the Court of Appeals, as he had done in the trial court, that inasmuch as Petitioner was injured on the Outer Continental Shelf and was receiving benefits under the Longshoremen and Harbor Workers Act, that pursuant to the express provisions of the Outer Continental Shelf Lands Act, state workmen's compensation defenses were not applicable to the case. The state compensation act was clearly inconsistent with and must yield to the federal act.

The Third Circuit Court of Appeals for the State of Louisiana disagreed and stated that "we are not swayed by the many decisions cited by plaintiff such as *Jenkins v.*

McDermott, Inc., 734 F. 2d 229 (5th Cir. 1984), . . ." The Court went on to cite *Sunship, Inc. v. Pennsylvania*, 447 U.S. 715, 100 S.Ct. 2432, 65 L.Ed. 2d 458 (1980) however this was a case dealing with land base injury and did not involve worker injury on the shelf.

The Court of Appeals affirmed the trial court's granting of the Motion for Summary Judgment holding that state law did apply, even though it was clearly inconsistent with federal law. Motion for rehearing was denied by a vote of two to one. Timely writs were taken to the Louisiana State Supreme Court and writs were denied on May 23, 1989 by a vote of four to two.

ARGUMENT

The question presented is whether a state court can apply state workmen's compensation laws to someone injured on the Outer Continental Shelf and thereby grant tort immunity to a principal when the federal law clearly states that he has no such tort immunity. It is simply a question of which law prevails on the Outer Continental Shelf when they are in conflict with each other - state law or federal law.

The Outer Continental Shelf Lands Act, 43 U.S.C.S S1333, specifically provides that state law will be surrogate federal law to the extent that state law is not inconsistent with or in conflict with the act or other federal laws and regulations. 43 U.S.C.S. S1333(b) specifically states that the Longshoremen and Harbor Workers Compensation Act, 33 U.S.C.S. S901, et seq. applies to disability or death of an employee who is injured on the Outer Continental Shelf.

The Longshoremen and Harbor Workers Act Section

904(a) and 905(a) provide that only two classes of employers or "principals" may be granted tort immunity. First, the employer himself is granted tort immunity if he provides coverage under the Longshore Act to his employee. Secondly, if the subcontractor-employer fails to secure the payment of Longshore benefits to his employee and the general contractor is required to secure such payment, then the general contractor, or principal, is also granted tort immunity.

Congress amended the Longshore Act in 1984 to negate the holding of *Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925, 104 S. Ct. 2827; 81 L. Ed. 2d 768 (1984), with the provisos that the amendment would apply to all claims pending as of the date of the amendment and that the contractor can only be granted tort immunity under 905(a) if the subcontractor had failed to secure Longshore payments the contractor had provided those in place of the subcontractor. See the case of *Louvere v. Marathon Oil Company,* 755 F.2d 428 (5th Cir. 1985)

Although Mesa did not fall in either catagory granting tort immunity, Louisiana Courts held that Mesa would be granted tort immunity pursuant to the workman's compensation defenses provided by Louisiana Statutes 22:1032 and 22:1061. Clearly the statutory immunity provided by the Louisiana Workman's Compensation Act is inconsistent with and in direct conflict with the provisions of the Outer Continental Shelf Lands Act which mandate that the Longshoremen and Harbor Workers Act shall be applicable to injuries on the Outer Continental Shelf. In his appellate brief, Petitioner argued that the United States Fifth Circuit Court of Appeals had previously considered the question and decided that the state comp immunity is inconsistent with and in conflict with the Longshore Act and is therefore not applicable.

In *Gates v. Shell Oil*, 812 F.2d 1509 (5th Cir. 1987) the Court stated as follows:

> "*As a matter of law,* drilling platform owner which hired contractor to install the piping on new platform did not have "statutory employer" defense created by Louisiana compensation law available to it in suit brought by contractor's employee against owner under Outer Continental Shelf Lands Act for injuries he received while working on platform; provisions of Louisiana compensation law setting up "statutory employer" definition of coverage is inconsistent with provision of Longshore and Harbor Workers' Compensation Act, which is applicable to offshore workers under OCSLA, since contractor was employee's "employer" under LHWCA. Longshore and Harbor Workers' Compensation Act S33, 33 U.S.C.A. S933; Outer Continental Shelf Lands Act, S4(b), as amended, 43 U.S.C.A. S1333(b); LSA R.S. 23:1032, 23:1061."

This is consistent with the holding of *Jenkins v. McDermott, Inc.*, 734 F.2d 229, (5th Cir. 1984) which also noted that "Louisiana is the only jurisdiction that extends this exclusive remedy to statutory employers" at P. 234.

The decisions by the Louisiana State courts are not only inconsistent and in conflict with the provisions of the Longshore Act but also fly in the face of Article 6 cl.2 of the Constitution of the United states, the supremacy clause.

The intent of Congress in making federal law applicable to injured workers on the Outer Continental Shelf was to insure to the extent possible, uniform treatment and recovery for similar types of injuries on the shelf without regard to the laws of the adjacent state. If the state court

decisions in this case are allowed to stand, then Petitioner would be denied a cause of action against Mesa Offshore simply on the basis that although he was injured on the Outer Continental Shelf, in federal territory, he is a citizen of Louisiana and can not pursue his tort remedy, whereas if he had been similarly injured on the Outer Continental Shelf adjacent to any other state in the union, he would have such a remedy.

This is clearly inconsistent and is an injustice which needs to be addressed. More importantly if state law is allowed to take precedent over federal law this would create confusion on the shelf as well as undermine the supremacy clause of the United States Constitution.

CONCLUSION

This accident occurred on the Outer Continental Shelf, an area in which Congress has specified that federal law should apply. The Outer Continental Shelf Lands Act specifically provides that the Longshore Act shall be applied to injured workers on the shelf. Mesa Offshore has no tort immunity under the Longshore Act but they were given tort immunity under the Louisiana Workmen's Compensation Act. This is clearly inconsistent.

Petitioner respectfully moves this Honorable Court to grant Writs of Certiorari or Review to reverse the holdings of the Louisiana State Courts or to remand the case to the Third Circuit Court of Appeals for the State of Louisiana with instructions that Louisiana State Workmen's Compensation defenses are not available to Mesa Offshore in this case and to proceed accordingly.

RESPECTFULLY SUBMITTED,

/s/ Raleigh Newman
RALEIGH NEWMAN
435 10TH STREET
LAKE CHARLES, LA. 70601
(318) 439-5788

ATTORNEY FOR PETITIONER,
JAKE CRATER, SR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 8th day of August, 1989, served a copy of the foregoing pleading on all counsel of this proceeding by mailing same by United States mail, properly addressed and first class postage prepaid.

/s/ Raleigh Newman

RALEIGH NEWMAN

APPENDIX A

JAKE CRATER, SR.	*	27TH JUDICIAL DISTRICT COURT
VERSUS	*	DOCKET NO: 84-0967-C
MESA PETROLEUM, ET AL.	*	ST. LANDRY PARISH, LOUISIANA

JUDGMENT

This matter came before the Court on Motion for Summary Judgment by Mesa Petroleum Company, defendant herein, seeking summary judgment on all claims by the plaintiff, Jake Crater, against Mesa Petroleum in this matter, the Honorable Isom J. Guillory, Jr. presiding. After hearing the arguments of counsel reviewing the briefs submitted by all concerned parties and the evidence submitted into the record in connection with this matter, this Court, in written Reasons dated March 22, 1988, upon finding the law and the evidence in favor of the Mover, Mesa Petroleum Company, granted summary judgment in favor of Mesa Petroleum Company dismissing the plaintiff's claims against Mesa Petroleum Company with prejudice and at plaintiff's costs. Therefore,

IT IS ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment filed by Mesa Petroleum Company is granted, and, accordingly that final judgment pursuant to Articles 1841 and 1842 of the Louisiana Code of Civil Procedure is hereby rendered in favor of Mesa Petroleum Company and against Jake Crater, plaintiff, dismissing the Petition filed on behalf of the plaintiff,

including any and all supplemental and amending petitions insofar as those petitions filed on behalf of the plaintiff contain allegations against Mesa Petroleum Company, with prejudice, with all costs to be paid by plaintiff.

JUDGMENT RENDERED at Opelousas, Louisiana on the 22 day of March, 1988, and read, signed and filed at Opelousas, Louisiana on the 22 day of April, 1988.

/s/ Illegible
DISTRICT JUDGE

FILED April 22 1988

Laura Noel
Dy. Clark

NOTICE OF JUDGMENT

APR 28 RECD

Jake Crater, Sr. : **STATE OF LOUISIANA**

VS. NO. 84-0967-C : Twenty-Seventh **JUDICIAL DISTRICT COURT**

Mesa Petroleum, et al : **PARISH OF** St. Landry

TO: Mr. Craig W. Marks
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P. O. Box 91410
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Mr. Raleigh Newman
Attorney at Law
435 10th Street
Lake Charles, La. 70601

Mr. Charles Harper
Attorney at Law
P. O. Box 910
Lake Charles, La. 70602

a resident of the Parish of Lafayette, Calcasieu, **State of Louisiana,**

You are hereby notified that on the 22nd **day of** April, 1988 **judgment was rendered**
a certified copy of which said judgment is annexed hereto and made part hereof.

WITNESS the Honorable Isom J. Guillory, Jr., **Judge of said Court.**

Granted under the impress of the seal of said Court, and my official signature this 22nd **day of** April, **A.D.,** 1988.

/s/ Laura Noel
Clerk of Court

APPENDIX B

OFFICE OF CLERK

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA
P.O. BOX 3000
Lake Charles, La. 70602

FEB 8 RECD
FEB 08, 1989

NOTICE OF JUDGMENT

TO ALL COUNSEL OF RECORD:

ATTACHED YOU WILL FIND A COPY OF THE JUDGMENT OF THIS COURT IN A CASE IN WHICH YOU ARE ATTORNEY OF RECORD.

Your attention is invited to Rule 2.18.2 of the Uniform Rules — Courts of Appeal, which regulates applications for rehearing.

Please note also that it is no longer necessary to apply to the Court of Appeal for a rehearing as a prerequisite to applying to the Supreme Court for writs.

Cordially yours,

Kenneth J. deBlanc
Clerk of Court

cc: Suit Record

(**NOTE:** Office hours are 8:30 A.M. to 4:30 P.M. for filings).

NUMBER 88-748

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

FEB 8 1989

JAKE CRATER, SR.

Plaintiff -Appellant

VERSUS

MESA OFFSHORE CO., ET AL

Defendants - Appellee/Appellant

On appeal from the Twenty-Seventh Judicial District Court for the Parish of St. Landry, State of Louisiana, the Honorable Isom J. Guillory, Judge, presiding.

Before: DOMENGEAUX, STOKER, and DOUCET, JJ.

DOUCET, Judge.

The above numbered and entitled appeal was consolidated with an appeal entitled *Jake Crater v. Mesa Offshore, et al*, ____ So.2d ____ (La. App. 3rd Cir. 1988), our docket number 87-1108. Both appeals arise out of the same suit for damages. We decide all issues presented in both appeals in this opinion but render a separate decree in the companion appeal.

Plaintiff, Jake Crater, Sr., filed suit for damages incurred as a result of injuries sustained in a work related accident. Named defendants were Mesa Petroleum Company

(Mesa) and Nicklos Drilling Company (Nicklos). National Union Fire Insurance Company intervened in the suit. Mesa filed a third party demand against B. J. Hughes Sand Control (Hughes) seeking defense costs, indemnity and contribution. With respect to the main demand, Mesa filed a motion for summary judgment seeking dismissal on all claims against it by plaintiff. The district court granted such motion. With respect to the third party demand, Hughes filed a motion for summary judgment seeking dismissal on all claims against it by Mesa. Such motion was granted. It is from these judgments the plaintiff and Mesa appeal.

Plaintiff was employed by B. J. Hughes Sand Control as a bulkhand in May of 1983. At this time, plaintiff was working on a fixed platform operated by Mesa which was located in the Gulf of Mexico, off of the coast of Louisiana on the Outer Continental Shelf. Mesa had previously entered into a contractual arrangement with Santa Fe Energy Company (Santa Fe) concerning the exploration for the production of hydrocarbon products on this site. The agreement specifically provided that Mesa would act as the "operator" of the well. Hughes was working on the Mesa platform pursuant to a contract between it and Mesa. A self-contained platform rig owned and operated by Nicklos was located on the platform.

Plaintiff injured himself as he and the Hughes crew were setting up equipment. Plaintiff slipped on a liquid substance on the deck, lost his balance, and twisted his back. Plaintiff began receiving benefits under the Longshore and Harbor Worker's Compensation Act (LHWCA) and subsequently filed this suit. The suit was premised on allegations of defendants' negligence relative to the operations ongoing at the time of the incident in question.

On appeal, plaintiff asserts that the trial court erred when it granted summary judgment in favor of Mesa. In support of this contention, plaintiff asserts two assignments of error. He first contends that "The trial court erred in holding that the provisions of the Louisiana Workmen's Commpensation act granted tort immunity against an employee who is drawing compensation benefits under the Longshore Act as a result of injuries on a fixed platform situated on the Outer Continental Shelf." We disagree.

As As previously mentioned, the incident giving rise to this suit occurred on a fixed platform on the Outer Continental Shelf off of the coast of Louisiana. Pursuant to the provisions of the Outer Continental Shelf Lands Act, Section 1333, the law of the adjacent state, to the extent such law is not inconsistent with Federal Law, applies as "surrogate" federal law.

The Louisiana Supreme Court in *Thompson v. Teledyne Movable Offshore, Inc.*, 419 So.2d 822 (La. 1982), held that the LHWCA in not the exclusive remedy for a worker whose injury occurred on an oil platform on the Outer Continental Shelf off of the State of Louisiana and added that the Louisiana Workmen's Compensation Act could constitutionally apply to an injury received on a fixed platform in the Gulf of Mexico. In doing so, the court stated:

> "We conclude that the LHWCA is not the exclusively applicable worker's compensation statute for injuries occurring on the Outer Continental Shelf. Such exclusivity is neither mandated by Federal Statute, by legislative history, nor by incompatibility with state law."

In *Garvin v. Alumax of South Carolina, Inc.*, 787 F.2d 910 (U.S. 4th Cir. 1986), the court ruled that an injured longshoreman could not pursue a tort claim against a contractor which owned the piece of equipment that injured the plaintiff because that contractor was entitled to immunity under the South Carolina Worker's Compensation Statute as the plaintiff's statutory employer.

In *Garvin*, supra, Alumax leased a ship terminal in South Carolina which was operated by the plaintiff's employer. The plaintiff was injured working at the terminal and commenced receiving compensation benefits under the LHWCA. He subsequently instituted a tort action in federal court against Alumax. Alumax filed a motion to dismiss the suit on the grounds that under South Carolina Law it was the statutory employer of the plaintiff and was immune from suit in tort by plaintiff. The district court denied the motion holding that LHWCA took precedence over state law and it offered no such immunity. The Fourth Circuit reversed finding that the LHWCA and the state statute were not repugnant and that Alumax was entitled to avail itself of the "statutory employer" immunity provided under South Carolina Law. According to the Fourth Circuit, the issue was whether the plaintiff's choice limited the defenses available to the party he had sued on the tort claim. Commenting that "the Federal and State Statutes, are readily harmonized and each may function in its own sphere without interference with the other," the court ultimately concluded that there was no conflict between the differing rules of immunity within the LHWCA and the South Carolina Statute. Accordingly, Alumax was entitled to urge the "statutory employer" immunity defense.

More recently, this court, in *Lewis v. Modular Quarters*, 508 So.2d 975 (La. App. 3rd Cir. 1987) confronted the issue at hand and held that a defendant sued by a plain-

tiff receiving Longshoreman Compensation benefits is entitled to assert the statutory employer defense available under Louisiana Law since the accident occurred in a location where both the LHWCA and Louisiana Compensation Statute would apply.

In *Lewis*, supra, the plaintiff filed suit for damages incurred as a result of injuries sustained in a work related accident. Named as defendants were Universal Fabricators, Inc. (Unifab), Modular Quarters, Inc. (Modular), and Abbeville Lumber Co, Inc.

In *Lewis*, surpa, the accideant occurred as the plaintiff, employed by 4-D Corrosion Control, was engaged in sandblasting work on a two-story living quarters unit located in Unifab's yard. Plaintiff was climbing a stair-way attached to the side of the unit when he tripped and fell approximately 15 feet to the ground below. As a result of the accident, plaintiff began receiving LHWCA benefits and subsequently filed suit against the defendant.

Unifab moved for summary judgment, urging that it was immune from suit as the statutory employer of the plaintiff. (4-D Corrosion had been contracted to do the sandblasting work by Unifab who was in the business of doing fabrication and refurbishing work of oilfield structures). The lower court granted Unifab's motion for summary judgment finding there was no genuine issue as to the fact that Unifab was the statutory employer of the plaintiff, and thus, plaintiff's exclusive remedy under Louisiana Law was limited to Worker's Compensation benefits and Unifab was immune from suit in tort by plaintiff.

On appeal, the plaintiff in *Lewis*, supra, argued that if he was covered under the LHWCA, then the "statutory employer" immunity provided under Louisiana Worker's

Compensation Law would be inapplicable to the facts of their case.

In deciding the case, this court noted the obvious conflict between the provisions of the Louisiana Worker's Compensation Act, specifically the "statutory employer" immunity provided by La. R.S. 23:1032 and 23:1061 and the LHWCA. We also cited *Sunship, Inc. v. Pennsylvania*, 447 U.S. 715, 100 S.Ct. 2432, 65 L.Ed.2d 458 (1980) wherein the U.S. Supreme Court held that the LHWCA is to be applied concurrently with state worker's compensation schemes. Ultimately, we concluded that in view of the history of the LHWCA as set forth in *Sunship*, supra, and in *Garvin*, supra, we could "discern no intent by congress to negate the available defenses provided by state law to third party claims brought pursuant to state law." Since the plaintiff's claim against Unifab was brought under state and not federal law, we affirmed the district court's granting of summary judgment in favor of Unifab.

Thus, the law of this court, as pronounced in *Lewis*, supra, is that a defendant may assert those defenses available under the Louisiana Worker's Compensation act in those areas where that Act and the LHWCA apply concurrently.

We are not swayed by the many decisions cited by plaintiff such as *Jenkins v. McDermott, Inc.*, 734 F.2d 229 (5th Cir. 1984), vacated on other grounds, 742 F.2d 191 (5th Cir. 1984), or *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La. 1976). After relying in part on *Garvin*, supra, in making our determinataion in *Lewis*, supra, we stated:

> "We find that, even though it (*Garvin*) conflicts somewhat with the decision in *Jenkins*, supra, and *Poche*, supra, the well reasoned decision in

Garvin supra, more properly reflects the views of this court regarding the tension between the LHWCA and state worker's compensation schemes."

We specifically reaffirm our views as stated in *Lewis*, supra. Thus, we find that the trial court did not err when it found that Mesa was entitled to assert the statutory defense provided by the Louisiana Compensation Act. As such, we will not disturb this finding on appeal.

Plaintiff next asserts that the trial court erred in granting tort immunity to Mesa Petroleum Company based on the provisions of La. R.S. 23:1061 and La. R.S. 23:1031. We disagree.

The Louisiana Worker's Compensation Law provides that there are times when an owner or principal will be liable for worker's compensation to an employee of a contractor he engages. La. R.S. 23:1061 provides:

> "Where any person (in this section referred to as principal) undertakes to execute any work, which is a part of his trade, business, or occupation or which he had contracted to perform, and contracts with any person (in this section referred to as contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the work or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him; and where compensation is claimed from, or proceedings are taken against, the principal, then, in the application of this Chapter reference to the principal shall be substituted for reference to the

> employer, except that the amount of compensation shall be calculated with reference to the earnings of the employee under the employer by whom he is immediately employed.
>
> Where the principal is liable to pay compensation under this Section, he shall be entitled to indemnity from any person who independently of this Section would have been liable to pay compensation to the employee or his dependent, and shall have a cause of action therefor."

In such a case the principal is immune from tort liability, worker's compensation being the contractor's exclusive remedy. La. R.S. 23:1032 in pertinent part, provides:

> "The rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, or relations, against his employer, *or any principal* or any officer, director, stockholder, partner or employee of such employer or principal, for said injury, or compensable sickness or disease. *For purposes of this Section, the word (principal) shall be defined as any person who undertakes to execute any work which is a part of his trade, business or occupation in which he was engaged at the time of the injury, or which he had contracted to perform and contracts with any person for the execution thereof.*"
>
> (emphasis added)

The interpretations of La. R.S. 23:1061 and 23:1032

have been numerous, and expanding "tests" have developed for determining statutory employment and whether the statutory tort defense is available in a given factual situation.

Mesa relies on the second prong of La. R.S. 23:1032, a test which is often referred to as the "two contract theory," in support of its assertion that it is immune from suit in tort. The Louisiana Supreme Court illustrates what the "two-contract" defense is in a footnote in *Berry v. Holston Well Service, Inc.*, 488 So.2d 934 (La. 1986). In *Berry* supra, at p.936, n.3, the court stated:

> "[A]n owner contracts with a general contractor to do a job. The general contractor in turn contracts with a subcontractor for the 'sub' has been held in decisions of the intermediate courts to be automatically within the trade, business or occupation of the 'general'."

The two-contract situation was defined in *Barnhill v. American Well Service and Salvage*, 432 So.2d 917 (La. App. 3rd Cir. 1983) as "[a]nytime the principal contracts to do any work (whether part of the principal's regular trade, business or occupation being immaterial) and then contracts with another party for the work." The Louisiana Fifth Circuit in *Thornton v. Avondale Shipyards, Inc.*, 479 So.2d 7 (La. App. 5th Cir. 1985), describes this section 1061 defense as when "[t]he principal has contracted to perform some work for a third party and then contracts out all or part of the work to [a] subcontractor-employer."

As previously stated, Mesa entered into a contract with several parties to act as operator and pursue exploration for and production of hydrocarbon products in the Gulf of Mexico in Vermilion Block 361. The agreement specifically provided that Mesa "shall have the exclusive

charge, control, supervision and management of all operations of every kind conducted on the joint lease for exploring for, developing, gathering, treating, handling, taking care of and saving oil and gas." In order to fulfill its obligation under this operating agreement, Mesa subcontracted with B. J. Hughes Sand Control. B. J. Hughes Sand Control employed plaintiff. Pursuant to the agreement between Mesa and Hughes, Hughes was performing work on Vermilion Block 361 on the date of the accideant to allow production on that platform. It follows that since plaintiff was injured while executing work Mesa had contracted to perform and subcontracted to have done by B. J. Hughes Sand Control, Mesa is entitled to statutory employer status under the second prong of La. R.S. 23:0161. Accordingly, Mesa is immune from tort suit. After carefully reviewing the exhibits in support of Mesa's motion, we find that Mesa was clearly entitled to summary judgment.

Plaintiff asserts that because Mesa had an ownership interest in the lease at issue, it is not entitled to the "statutory employer" defense. We reject this assertion. Mesa contractually assumed the responsibilities of operator and undertook these obligations. The document clearly imposes obligations on Mesa and Mesa then undertook to fulfill those obligations by subcontracting a portion of them to plaintiff's employer. Clearly, this scenario fits with the realm of the "two contract theory" and Mesa's ownership interest in the lease does not change such a finding.

As previously stated, Mesa filed a third party demand against B. J. Hughes Sand Control seeking defense costs, indemnity and contribution. Hughes filed a motion for summary judgment seeking dismissal on all claims against it by Mesa. The District Court granted the motion for summary judgment.

Having found that the District Court properly granted Mesa's motion for summary judgment on the main demand, the issues of indemnification and contribution are moot. With respect to Mesa's demand for defense costs, the Louisiana Supreme Court in *Meloy v. Conoco*, 504 So.2d 833 (La. 1987) spoke clearly to this issue. The court in *Meloy*, supra, stated:

> "[A] cause of action for indemnification for cost of defense does not arise until the lawsuit is concluded and defense costs are paid . . .[T]he indemnitor's obligation for costs of defense cannot be determined until there has been a judicial finding that the indemnitee is liable or that the charges against it were baseless." 504 So.2d at 839.

According to the clear pronouncement by the Louisiana Supreme Court in *Meloy*, supra, there can be no obligation on the part of the contractual indemnitor (B. J. Hughes) to pay for the indemnitee's (Mesa's) defense costs unless and until there is a determination that the indemnitee was totally free from fault. Unless and until that determination is made, Mesa's right to claim defense costs of B. J. Hughes is premature. As such, the District Court's granting of summary judgment in favor of B. J. Hughes was proper.

Accordingly, for the reasons assigned, the judgments of the lower court are affirmed in all respects. Costs of the appeal are to be shared equally between defendant Mesa Petroleum and plaintiff Jake Crater, Sr.

AFFIRMED.

APPENDIX C

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

MAR 9 RECD

JAKE CRATER, SR.

V.

MESA OFFSHORE CO., ET AL.

No. 88-748

BEFORE: JUDGES DOMENGEAUX-STOKER-DOUCET

ORDER

The Application....for Rehearing herein having been duly considered:

IT IS ORDERED that a Rehearing be, and the same is hereby, DENIED

DOMENGEAUX, CJ, WOULD GRANT,

Lake Charles, Louisiana, this 8th day of March, 1989.

JMS

NED

Judges

Filed MAR 8 1989

/s/Nancy U. Pledger

Clerk

APPENDIX D

THE SUPREME COURT OF THE STATE OF LOUISIANA

JAKE CRATER, SR.

VS. NO. 89-C - 0822

MESA OFFSHORE CO., et al

. . . . . .

IN RE: Crater, Jake Sr., - Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Third Circuit, Number CA88-0748, CA87-1108; Parish of St. Landry 27th Judicial District Court Div. "C" Number 84-0967

. . . . . .

May 12, 1989

Denied.

JCW
JAD
WFM
LFC

CALOGERO & DENNIS, JJ., would grant the writ.

Supreme Court of Louisiana
May 12, 1989

/s/ Illegible

Clerk of Court
For the Court

FILED
SEP 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-234

In The

Supreme Court of the United States

October Term, 1989

JAKE CRATER, SR.

Petitioner,

versus

MESA PETROLEUM COMPANY, ET AL.

Respondent.

On Writ Of Certiorari Or Review To The Third Circuit Court Of Appeals For The State Of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Trial Court and the Louisiana Third Circuit erred in holding that Louisiana State Workmen's Compensation Laws were not pre-empted by the LHWCA through the OCSLA with respect to an injury to a Louisiana State worker on a fixed platform on the Outer Continental Shelf, Offshore of Louisiana.

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No. 89-234

In The

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JAKE CRATER, SR.

Petitioner,

versus

MESA PETROLEUM COMPANY, ET AL

Respondent.

On Writ Of Certiorari Or Review To The Third Circuit Court Of Appeals For The State Of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Mesa Petroleum Company, respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed herein by Jake Crater, Sr.

STATEMENT OF THE CASE

This matter is before this Honorable Court on an Application for Writ of Certiorari filed on behalf of the petitioner and plaintiff, Jake Crater. Petitioner's writ

application has its origin in a Motion for Summary Judgment filed on behalf of this respondent, Mesa Petroleum Company. Specifically, Mesa Petroleum filed the aforementioned Motion for Summary Judgment seeking summary judgment on all claims by the petitioner against Mesa.

In very simple terms, it is/was the contention of Mesa no issues of material fact existed relative to Mesa Petroleum's status as the statutory employer of Mr. Crater pursuant to certain provisions of Louisiana's Workers' Compensation Statute. Accordingly, Mesa Petroleum is immune from any tort liability to Mr. Crater under that statute.

In support of its Motion, Mesa Petroleum Company submitted several exhibits into evidence. These exhibits included (1) a copy of the "Operating Agreement" from Block 381, Vermilion Area, Offshore, Louisiana between Mesa Petroleum and Sante Fe Energy Company, dated December 1, 1989; (2) a copy of the "Master Service Contract", dated March 18, 1980 between Mesa Petroleum and B. J. Hughes Sand Control (Mr. Crater's employer); (3) plaintiff's petition; (4) the deposition of Mr. Crater; (5) Interrogatories propounded by the plaintiff in responses thereto by Mesa Petroleum; (6) the Affidavit of James C. Cooper, plaintiff's supervisor; (7) the Affidavit of Guy A. Thibodeaux, Senior Production Engineer of Mesa Petroleum.

After hearing the arguments of counsel, reviewing the briefs submitted by all concerned parties and the evidence submitted into the record in connection with this matter, the Honorable Isom J. Guillory, District Judge

for the 27th Judicial District Court, St. Landry Parish, in written reasons, dated March 22, 1988, on finding the law and the evidence in favor of Mesa Petroleum, granted summary judgment in favor of Mesa dismissing plaintiff's claims against Mesa Petroleum with prejudice and at plaintiff's costs. Those written reasons are attached hereto as Appendix A.

The plaintiff and Intervenor, National Union Fire Insurance Company, took an appeal to the Louisiana Third Circuit, contending the decision of the Lower Court was incorrect and should be reversed. In denying the plaintiff's appeal and upholding the Trial Court's decision, the Louisiana Third Circuit rejected plaintiff's suggestion that Louisiana Law, including Louisiana's Workers' Compensation Statute, should not apply under the facts of the case. After weighing what was perceived as a "tension between the LHWCA and State Workers' Compensation Schemes", the Court concluded that a defendant may assert those defenses available under the Louisiana Workers' Compensation Act and those areas where the Act and the LHWCA apply concurrently. The Louisiana Third Circuit's opinion is contained within plaintiff's Writ Application as Appendix B at Page A-5.

Plaintiff and Intervenor then applied for rehearing to the Third Circuit arguing essentially, in part, the same position as is reflected in this Writ of Certiorari Application. That petition for rehearing was denied by a vote of two to one. The plaintiff and Intervenor next sought a Writ of Certiorari to the Louisiana Supreme Court, again arguing, essentially, in part, the same argumenis as are

presented by this Writ Application. Without written reasons assigned, and by a vote of four to two, the Louisiana Supreme Court denied the aforesaid Writ Application.

SUMMARY OF ARGUMENT

The District Judge and the Louisiana Third Circuit did not err in granting summary judgment in favor of Mesa Petroleum Company dismissing, with prejudice, plaintiff's claims against Mesa as Mesa is immune from any tort liability to the plaintiff pursuant to Louisiana's Workers' Compensation Statute.

ARGUMENT

It is respectfully submitted that the Trial Court and the Louisiana Third Circuit were correct in concluding that Mesa Petroleum Company, under the facts of this case, was entitled to assert the "statutory employer" defense available under Louisiana Law. As such, Mesa Petroleum feels it necessary to provide the Court with a more detailed statement of the case's facts so as to give meaning to its opposition to this Writ Application.

I. FACTS

On May 13, 1983, Jake Crater, Sr., employed by B. J. Hughes Sand Control as a bulk hand, was working on a fixed platform operated by Mesa Petroleum Company and located in Vermilion Block 381, in the Gulf of Mexico, off the Coast of Louisiana on the Outer Continental Shelf.

At the time of the accident, a self-contained platform rig, Nicklos Rig #82, owned and operated by co-defendant, Nicklos Drilling Company, was located on the platform. Basically, the plaintiff's injuries occurred as B. J. Hughes' crew, including the plaintiff, was setting up their sand control equipment in preparation of doing work on that location.

Mr. Crater was living in Lake Charles and working for B. J. Hughes Sand Control out of its Lake Charles office at the time of the accident. He had been working for B. J. Hughes since approximately August or September, 1982. On December 1, 1979, Mesa Petroleum entered into a contractual arrangement with Santa Fe Energy Company concerning the exploration for and production of hydrocarbon products in the Gulf of Mexico off the Coast of Louisiana in Vermilion Block 381. Within that contract Mesa contractually obligated itself to act as operator and pursue exploration for and production of hydrocarbon products in Vermilion Block 381.

On the date of the accident, B. J. Hughes Sand Control was working on the Mesa Platform in Vermilion Block 381 pursuant to a contract between it and Mesa Petroleum Company dated March 18, 1981. As indicated, at the time of the accident, the B. J. Hughes' crew was in the process of setting up their equipment on the platform in preparation of doing sand control work pursuant to that contract. Specifically, on the aforementioned date, the Nicklos #82 rig was being used to complete the Vermilion 381 A-6 well. At that time, B. J. Hughes Sand Control was employed to "gravel pack" the well while it was being completed. This process is intended to impede the influx of sand while allowing production of flow.

Accordingly, Mesa is entitled to statutory employer status under applicable Louisiana law. Since Mr. Crater was injured while executing work Mesa had contracted to perform and subcontracted to have done by his direct employer, Mesa is immune from this suit and entitled to summary judgment.

II. THE LAW

As indicated, the incident in suit occurred on a fixed platform on the Outer Continental Shelf off the Coast of Louisiana. Pursuant to the terms of the Outer Continental Shelf Lands Act, Section 1333, the law of the adjacent state, to the extent such law is not inconsistent with Federal Law, applies as "surrogate" federal law to platform such as Eugene Island 208E. See *Hails vs. Atlantic Richfield Company*, 595 F. Supp. 984 (D. C. La., 1984).

In 1982, the Louisiana Supreme Court held that the Longshoremen and Harbor Workers Act (LHWCA) is not the exclusive remedy for a worker whose injury occurred on an oil platform on the Outer Continental Shelf off the State of Louisiana. See *Thompson vs. Teledyne Movable Offshore, Inc.*, 419 So. 2d 822 (La., 1982). The *Thompson* Court held that the Louisiana Workmen's Compensation Act could constitutionally apply to an injury received on a fixed platform in the Gulf of Mexico, some four miles off the Coast of Louisiana.

Specifically, the *Thompson* case involved a worker who was injured while employed on a fixed platform located on the Outer Continental Shelf off of Louisiana. The plaintiff therein sued for compensation benefits under the Louisiana Workers Compensation Act, and his

employer filed an exception of lack of jurisdiction over the subject matter, asserting the plaintiff's sole remedy was under the LHWCA. The issue was whether a worker hired in the State of Louisiana and injured while working on a fixed platform located on the Outer Continental Shelf beyond the territorial waters of the State of Louisiana was entitled to recover Louisiana compensation benefits notwithstanding his entitlement to benefits under the LHWCA.

To resolve that issue, the Court determined that the OCSLA, Section 1333(b), does not dictate that the LHWCA is the *only* Compensation Act that can be applied to instances of disability or death to an employee on the shelf. Further, the Court found no incompatibility between the Louisiana State Compensation Scheme and LHWCA insofar as their co-existence beyond Louisiana's territorial waters was concerned.

Specifically, the Court stated:

> "We conclude that the LHWCA is not the exclusively applicable worker's compensation statute for injuries occurring on the Outer Continental Shelf. Such exclusivity is neither mandated by Federal Statute, by legislative history, nor by incompatibility with State Law."

Based thereon, the Court determined the plaintiff, although injured while working on a fixed platform on the Outer Continental Shelf outside the territorial waters of Louisiana was entitled to receive State Compensation Benefits.

More recently, in *Logan vs. Louisiana Dock Company, Inc.*, No. 88-C-1506 (La., January 30, 1989), the Louisiana Supreme Court again had opportunity to confront the

issue of whether the LHWCA pre-empts application of Louisiana Workers' Compensation Statute. In this regard, the *Logan* Court held Louisiana's Workers' Compensation Act could constitutionally apply to an injury received on a dock or shorebased facility within Louisiana's territorial limits.

Specifically, the *Logan* case involved a worker who was injured while performing repairs to a barge on his employer's dry docks located in the Mississippi River at New Orleans. The plaintiff therein sued for compensation benefits under Louisiana's Workers' Compensation Act, and his employer answered challenging the jurisdiction of the Trial Court in addition to asserting other defenses. As designated by the Louisiana Supreme Court, the issue was whether the Trial Court had subject matter jurisdiction over the plaintiff's claim under Louisiana's Workers' Compensation Act or whether his State claim is pre-empted by the LHWCA.

In resolving that issue, the Court stated that the potential availability of a federal remedy did not necessarily foreclose the injured worker's claim for relief under State Law. Specifically, the Court stated:

> " . . . Absent federal pre-emption, Louisiana is free to extend *Logan* (the claimant) the protection of its worker's compensation laws. It is well established that federal pre-emption of State Law will not be found without a clear expression of congressional intent, and there is a strong presumption *against* finding pre-emption. See, e.g. *Metropolitan Life Insurance Company vs. Massachusetts*, 471 U. S. 724, (1985); and *Rice vs. Sante Fe Elevator Company*, 331 U. S. 218 (1947). . . . The U. S. Supreme Court has also noted that in cases of doubt concerning the

> applicability of State Compensation Law relative to the LHWCA, the question should be resolved in favor of the constitutionality of the State remedy. See *Director, Officer of Workers' Compensation Programs, U. S. Department of Labor vs. Perini North River Associates,* 459 U. S. 297, 309 (1983)." Id. at Pages 3 and 4 (emphasis added).

Noting that the LHWCA contained no expressed declaration of congressional intent to prohibit states from providing compensation to injured workers in lieu of, or in addition to, the LHWCA, the Supreme Court concluded the statute and its history "militates in favor of finding concurrent jurisdiction." Id. at Page 5.

In so ruling, the Court found the Lower Court of Appeal had erred in finding pre-emption mandated by the LHWCA. Specifically, the Louisiana Supreme Court felt pre-emption was contrary to the U. S. Supreme Court's interpretation of the LHWCA in *Sunship, Inc. vs. Pennsylvania,* 447 U. S. 715, 100 S. Ct. 2432, 65 L. Ed. 2d 458 (1980). The Court stated,

> " . . . We find nothing in the text of the LHWCA to support the broad pre-emption claims of the (Louisiana) Fourth Circuit below: State and federal compensation laws are complimentary, not contradictory; there is no evidence from the LHWCA of congressional intent to pre-empt state law; and, as noted above, Section 905 was designed not to pre-empt state remedies but to abolish non-LHWCA federal claims by injured longshoremen. Our conclusion that the concurrent jurisdiction is a better rule is supported by the scholarship on this issue. . . . A clear majority of the commentators, however, find concurrent jurisdiction is the better rule for a variety of legal and policy reasons. We agree. As a policy

> matter, it would be 'undesirable in the highest degree' to return to the notion that federal and state jurisdiction over claims such as *Logan's* are mutually exclusive. . . . Louisiana has a very important interest in assuring (that its citizens) who work in hazardous maritime related activities, are fully compensated for their injuries. . . . Accordingly we find concurrent jurisdiction as the better rule and should be applied to the fullest extent permissible." Id. at Pages 6 and 7.

The *Sunship* decision cited by the Louisiana Supreme Court in *Logan* was decided after the 1972 Amendments to the LHWCA which extended federal jurisdiction landward. Within that decision, this Court held that the enlarged jurisdiction supplemented rather than supplanted State Compensation Law. *Sunship* stated that the concurrent jurisdiction continued, and the amended LHWCA was not exclusive. *Sunship, supra,* at 447 U. S. 720.

Two Courts have recently confronted the issue at hand. Specifically, the U. S. Fourth Circuit in *Garvin vs. Alumax of South Carolina, Inc.*, 787 F. 2d 910 (U. S. 4th Cir., 1986), ruled that an injured longshoreman could not pursue a tort claim against a contractor which owned the piece of equipment that injured the plaintiff because that contractor was entitled to immunity under the South Carolina Worker's Compensation Statute as the plaintiff's statutory employer.

Mr. Garvin was employed by Lemm Corporation/ Operations which operated the terminal at which the plaintiff was working. The defendant, Alumax, was a lessee of the terminal and owner of an unloading machine installed on the terminal's pier.

While performing routine maintenance work on the unloading machine, the plaintiff came in contact with some electrically energized parts and was injured. He sued Alumax as owner of this machine, and Alumax moved to dismiss the claim on the ground that it was the statutory employer of the plaintiff under South Carolina's Workmen's Compensation Act.

The Lower Court denied the Motion, reasoning that since the LHWCA affirmatively extended immunity only to a contractor which was procured compensation insurance, that Statute and the South Carolina Worker's Compensation Statute were repugnant and the LHWCA took precedence under the supremacy clause.

Finding no repugnancy between the LHWCA and the South Carolina Compensation Act, the Fourth Circuit reversed and held that Alumax was entitled to the immunity conferred it by South Carolina Law. Interestingly enough, the Fourth Circuit did so even though the plaintiff had pursued compensation benefits under the LHWCA. According to the Fourth Circuit, the issue was whether the plaintiff's choice limited the defenses available to the party he had sued on the tort claim.

First, the Fourth Circuit discussed the intention of Congress in enacting the LHWCA. Noting that it was necessary for Congress within the LHWCA to deal in some fashion with employer immunity, the Court felt "nothing done in the Congress suggest that it intended to modify immunities provided general contractors by State Workmen's Compensation Laws, when those laws are applicable."

The Court felt that LHWCA set up some procedural rules but did not create any cause of action against third parties (other than a vessel related cause of action) or *define circumstances affecting rights of an injured to prevail in actions against third parties.*

Then, referring to *Ferri vs. Ackerman,* 444 U. S. 193 (1979), the Fourth Circuit quoted language by the U. S. Supreme Court related to a third party claim by an LHWCA recipient:

> "When State Law creates a cause of action, the State is free to define the defenses to the claim, including the defense of immunity, unless the State rules in conflict with Federal Law."

The Fourth Circuit concluded there was a conflict between the LHWCA and South Carolina's workmen's compensation related immunity defense because Congress had not purported to prescribe immunity rules to be applied by States in action based on State Law claims. In so deciding, the Court reasoned that Federal immunity applies to federal claims, but when a claim is based on State Law, State Law rules of immunity should apply.

Commenting that, "the Federal and State Statutes are readily harmonized, and each may function in its own sphere without interference with the other, "the Court concluded there was no conflict between the differing rules of immunity within the LHWCA and the South Carolina Statute. Accordingly, Alumax was entitled to urge the "statutory employer" immunity defense.

Further, prior to its decision in this matter, the Louisiana Third Circuit even more recently, confronted the

issue at hand and held that a defendant sued by a plaintiff receiving longshoreman compensation benefits is entitled to assert the statutory employer defense available under Louisiana Law since the accident occurred in a place where both the LHWCA and Louisiana Compensation Statute would apply. In *Lewis vs. Modular Quarters*, 508 So. 2d 975 (La. 3rd Cir., 1987), the plaintiff filed suit for damages incurred as a result of injuries sustained in a work related accident. Named as defendants were Modular Quarters, Universal Fabricators, Inc. (Unifab) and Abbeville Lumber Company.

Unifab moved for summary judgment, asserting that it was immune from suit as the statutory employer of the plaintiff. After a hearing, the Trial Court granted Unifab's Motion for Summary Judgment, finding that the pleadings and depositions established no genuine issue as to the fact that Unifab was the statutory employer of the plaintiff, and therefore, plaintiff's exclusive remedy under Louisiana Law was limited to worker's compensation benefits and Unifab was immune from suit in tort by plaintiff.

On appeal, plaintiff argued the Trial Court erred in granting the summary judgment because there was a genuine issue as to whether the plaintiff was a longshoreman for purposes of the LHWCA. Essentially, plaintiff argued that if he was covered under the LHWCA then the "statutory employer" immunity provided under Louisiana Worker's Compensation Law would not apply to the case at hand.

After noting that the conflict between the provisions of the Louisiana Worker's Compensation Law, specifically the "statutory employer" immunity provided by LSA-R.S. 23:1032 and 23:1061 and the LHWCA was "obvious," the *Lewis* panel, referred to the U. S. Supreme Court decision of *Sunship, Inc. vs. Pennsylvania*, 447 U. S. 715, 100 S. Ct. 2432, 65 L. Ed. 2d 458 (1980). In that case, the Supreme Court held that the LHWCA is to be applied concurrently with State Worker's Compensation schemes.

Ultimately, the *Lewis* panel concluded that in view of the history of the LHWCA as set forth by the U. S. Supreme Court in *Sunship, supra*, that Court (the Louisiana Third Circuit) could "discern no intent by Congress to negate the available defenses provided by State Law to third party claims brought pursuant to State Law." Since the plaintiff's claim against Unifab was clearly brought under State Law, not Federal Law, the Court affirmed the Lower Court's granting of summary judgment in favor of Unifab.

In so ruling, the *Lewis* Court relied heavily on the *Garvin, supra*, decision. After discussing the facts of the *Garvin* case, the *Lewis* Court noted that, "the well reasoned decision in *Garvin, supra*, more properly reflects the views of the *Lewis* Court regarding the tension between the LHWCA and State Worker's Compensation schemes." Further, the *Lewis* Court specifically relied on the *Garvin* decision in concluding there was no intent by Congress to prevent a defendant from using available defenses provided by State Law, including State compensation schemes, to third party claims even though the injured party may also be covered by the LHWCA.

III. ARGUMENT

In deciding whether the LHWCA through the OCSLA pre-empted application of Louisiana's Workers' Compensation Statute in this matter the Louisiana Third Circuit relied upon the *Thompson* decision, *supra; Garvin* decision, *supra* and the *Lewis* decision, *supra*. After again emphasizing that it could "discern no intent by Congress to negate the available defenses provided by State Law to third party claims brought pursuant to State Law", the Court pronounced, as in *Lewis*, that a defendant may assert those defenses available under the Louisiana Workers' Compensation Act in those areas where that Act and the LHWCA apply concurrently. See *Crater, supra* at A-10 of Appendex B of petitioner's Writ Application.

In response to plaintiff's arguments, the Louisiana Third Circuit noted that it was "not swayed" by the decision cited by plaintiff such as *Jenkins vs. McDermott, Inc.*, 734 F. 2d 229 (U. S. 5th Cir., 1984). In rejecting those arguments, the Court, quoting from *Lewis, supra*, again stated:

> "We find, even though it (*Garvin*) conflicts somewhat with the decision in *Jenkins, supra* and *Poche, supra*, the well reasoned decision in *Garvin, supra*, more properly reflects the views of this Court regarding the tension between the LHWCA and State Worker's Compensation schemes." (*Crater, supra* at A-10 of Appendix B of petitioner's Writ Application.

As such, the Court found the Trial Court did not err when it ruled that Mesa was entitled to assert the statutory defense provided by the Louisiana Compensation Act.

Plaintiff has argued the exclusivity of federal law on the Outer Continental Shelf where an injured employee chooses LHWCA benefits. In this regard, the Court must keep in mind that the plaintiff and the compensation carrier for his employer are suggesting to the Court that they, by deciding either jointly or separately, as to whether the employee will receive state or federal compensation benefits thereby control the defenses available to a third party tort defendant in a tort action brought by the injured employee.

Specifically, the plaintiff would impose some significance to the fact that he opted to recover compensation benefits under the LHWCA rather than Louisiana's Compensation Statute (to which he is available as pointed out in the *Thompson* decision, *supra*); however, Mesa would note to the Court that whether a plaintiff has sought compensation benefits is not relevant to the defenses available to any defendant sued in a tort claim. Rather, the critical inquiry is under what law the tort claims have been brought.

In this case, Mr. Crater has sued Mesa Petroleum under Louisiana's negligence theories applied to accidents on the Outer Continental Shelf through the OCSLA. Certainly, if Mr. Crater is entitled to sue Mesa based on a State cause of action, Mesa should be entitled to defend the suit with available State law defenses. Certainly, payment of State compensation benefits is not and has never been a pre-requisite for asserting "statutory employer" immunity under the applicable State statute.

In arguing that the decision of the Trial Court and the Louisiana Third Circuit should be reversed, plaintiff/

petition has relied heavily on two decision, *Gates vs. Shell Oil*, 812 F. 2d 1509 (U. S. 5th Cir., 1987) and *Jenkins vs. McDermott, Inc.*, 734 F. 2d 229 (U. S. 5th Cir., 1984). It is respectfully submitted that contrary to the plaintiff's contentions, those cases do not provide this Court with reason to grant a Writ of Certiorari and reverse.

With regard to the *Jenkins* decision, *supra*, Mesa would note that the decision was vacated. Specifically, on petitions for rehearing and suggestions for rehearing *en banc*, see 742 F. 2d 191 (U. S. 5th Cir., 1984), the original Panel which decided *Jenkins*, granted the petitions for Panel rehearing and vacated the original Panel opinion insofar as it reversed the summary judgment dismissing the plaintiff's negligence and strict liability claims against the defendant, McDermott. The Panel then remanded the matter to the District Court for further proceedings on those claims. As such, the discussions contained within the original Panel decision on the issues at hand can not be considered controlling in this matter. See *No East-West Highway Committee, Inc. vs. Chandler*, 767 F. 2d 21 (U. S. 1st Cir., 1985); *Fleet Arrowspace Corp. vs. Holderman*, 848 F. 2d 720 (U. S. 6th Cir., 1988).

Further, from a factual standpoint, *Jenkins* is readily distinguishable. In this regard, the case did not deal with a tort claim brought under the OCSLA. Instead, the emphasis of the Court dealt with whether Mr. Jenkins was engaged in maritime employment at the time of his injuries so as to entitle him to coverage under the LHWCA. The Court ultimately concluded plaintiff's work activity (i.e., assisting in the fabrication of an offshore drilling platform destined for use off the shores of Africa) was maritime employment. Whether Mr. Crater possesses

employee "status" is not at issue in this case since the question of whether his work was maritime or not has not been raised. Accordingly, *Jenkins* provides no support for plaintiff's writ application.

Plaintiff has offered no reason to support his argument that *Gates, supra,* should control save his argument that federal pre-emption is required. As has previously been presented to the Court, it is respectfully submitted that the better rule, as reflected in the cases cited herein, would allow for concurrent jurisdiction. Quoting from the Louisiana Supreme Court's decision in *Logan,* the following comments again succinctly state why federal pre-emption should not be the rule.

> "It is well established that federal pre-emption of State law will not be found without a clear expression of congressional intent, and there is a strong presumption against finding pre-emption. . . . The U. S. Supreme Court has also noted that in cases of doubt concerning the applicability of State compensation law relative to the LHWCA, the question should be resolved in favor of the constitutionality of the State remedy (citing *Perini, supra),*" *Logan, supra* at Pages 3 and 4.

> "We find nothing in the text of the LHWCA itself to support the broad pre-emption of claims of the (Louisiana) Fourth Circuit below: State and federal compensation laws are complementary, not contradictory; there is no evidence from the LHWCA of congressional intent to pre-empt State laws; and, as noted above, Section 905 was designated not to pre-empt State remedies but to abolish non-LHWCA federal claims by injured longshoremen. Our conclusion that the concurrent jurisdiction is a better rule is

> supported by the scholarship on this question. . . . Accordingly, we find concurrent jurisdiction as the better rule and should be applied to the fullest extent permissible." Id at Pages 6 and 7.

This attitude is shared by the U. S. Fourth Circuit which, in *Garvin, supra,* when considering the intention of Congress in enacting the LHWCA stated, "nothing done in the Congress suggest that it intended to modify immunities provided general contractors by State Workmen's Compensation Laws, when those laws are applicable." *Garvin, supra* at Page 917.

Commenting that, "the federal and state statutes are readily harmonized, and each may function in its own sphere without interference with the other," the U. S. Fourth Circuit concluded there was no conflict between the differing rules of immunity within the LHWCA and South Carolina's Workers' Compensation Statute which provided statutory employer immunity. *Garvin, supra* at Pages 917-918.

Accordingly, the applicable law in this case originating out of State Court in Louisiana and as set forth in *Thompson, supra; Logan, supra* and *Lewis, supra,* is that a defendant may assert those defenses available under Louisiana's Workers' Compensation Act in those areas where that Act and the LHWCA apply concurrently. The decision by the Louisiana Third Circuit in *Crater* is completely consistent with the aforecited cases as well as the *Garvin* decision, *supra,* out of the U. S. Fourth Circuit.

This Court has admonished in the past to not seek out conflicts between Federal and State laws "where none

clearly exists" or to strike down laws under the Supremacy Clause when application of State law will not frustrate Federal law. *Exxon Corporation vs. Governor of Maryland*, 437 U. S. 117, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978); *Colorado Anti-Discrimination Commission vs. Continental Air Lines, Inc.*, 372 U. S. 714, 83 S. Ct. 1022, 10 L. Ed. 2d 84 (1963).

It is respectfully submitted that both Congress and this Court has diligently attempted to preserve State law control over State law third party claims regardless of whether the claimant has received LHWCA or State compensation benefits. That attitude should continue with the denial of plaintiff's Writ Application in this matter.

CONCLUSION

In summary, it is respectfully submitted that as the claims against Mesa Petroleum in this matter are premised exclusively on State law, Mesa may assert those defenses available to it under Louisiana's Compensation Statute in those areas where that Act and the LHWCA apply concurrently. Such a rationale is completely consistent with the better reason and more persuasive jurisprudence on the subject originating out of Louisiana and the U. S. Fourth Circuit. As such, the decision of the Trial Court and the Louisiana Third Circuit is correct, should not be reversed and plaintiff's Application for Writ of Certiorari to this Court should be denied.

Respectfully submitted,

JEANSONNE AND BRINEY

/s/ Craig W. Marks
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APPENDIX

REASONS FOR JUDGMENT

JAKE CRATER, SR.	:	NO. 84-0967-C, CIVIL DOCKET
VS.	:	27TH JUDICIAL DISTRICT COURT
MESA PETROLEUM, ET AL.	:	ST. LANDRY PARISH, LOUISIANA

What the Court is considering in this matter, through a Motion for Summary Judgment, is the "statutory employer" concept.

Lewis, 508 So.2d 975 at the time of trial of the Motion was on writs to the Supreme Court. The Supreme Court has now affirmed the Third Circuit; and, while Lewis would seem, on the surface, to be in conflict with, perhaps, some Federal decisions, it can be reconciled through Berry, 488 So.2d 934, which is discussed in Lewis.

Berry, in this Court's opinion, leaves a lot to subjective evaluation, and each case will have to be examined subjectively on its own facts.

Be that as it may, Lewis is so close on the facts to the present case, it must govern; unless the Higher Court sees fit to distinguish it on the facts, through Berry.

Accordingly, the Motion is granted.

Counsel for Mover will prepare the proper Judgment, mail a copy to opposing counsel for approval as to form, in writing, and present the Judgment for signature.

Opelousas, Louisiana, this 22 day of March, 1988.

/s/ Isom J. Guillory, Jr.
DISTRICT JUDGE

cc: Raleigh Newman
H. Lee Lewis, Jr.
Gregory P. Massey
Craig W. Marks
James E. Diaz, Sr.
John K. Hill
Owen M. Goudelocke

Filed March 22, 1988

/s/ Laura Noel
Dy. Clerk

A TRUE COPY

Laura Noel